TEXAS RISK MANAGEMENT MANUAL - CHAPTER 1: RISK MANAGEMENT 101

WILLIAM H. LOCKE JR., *Austin*
Graves Dougherty Hearon & Moody

State Bar of Texas
40TH ANNUAL
ADVANCED REAL ESTATE LAW
July 12-14, 2018
San Antonio

CHAPTER 4.1

TABLE OF CONTENTS

RISK MANAGEMENT 101

I. INTRODUCTION TO RISK MANAGEMENT

A. Risk of Property Loss and Injuries

1. Premises

A person injured on another's property has two potential causes of action against the owner of the property: a premises liability claim for an unreasonably dangerous condition on the premises, or a negligence claim for negligent activity on the premises. When the alleged injury is the result of a negligent activity, the injured party must have been injured by, or as a contemporaneous result of, the activity itself, not by a condition the activity created. The negligent activity theory of liability is only applicable where the evidence shows that the injuries were directly related to the activity itself. If the injury was created by a condition created by an activity rather than the activity itself, the plaintiff claiming negligent activity is limited to a premises liability theory of recovery. See 59 TEX. JUR. 3d Premises Liability § 7 *Negligent activity and premises defect bases for premises liability – Negligent activity claim*.

2. Leased Premises

The following list illustrates some of the many property loss and injury risk allocation questions to be addressed in leases:

- Upon casualty loss, what happens to the lease, does it terminate or does it continue?
- If due to a casualty loss the premises become untenantable, what happens to the rent?
- Who is responsible for the restoration of the premises?
- Is the premises located in special hazard areas, such as flood zones, hurricane or earthquake areas?
- Are there tenant improvements and betterments to the premises?
- Does the tenant's operations at the premises result in invitees coming to the premises or the use of contractors, business autos, or high pressured boilers at the premises?
- Are there special environmental hazards or other extraordinary risks associated with tenant's use of the premises?
- Who is responsible for injuries occurring on the premises?
- Is the protecting party financially capable of funding the loss or injury without insurance?
- If rent and income by the parties is interrupted due to the occurrence of the peril, will the financial stability of either or both of the lease parties be materially adversely affected?
- Is insurance available to fund protection against these risks at a commercially affordable rate? What minimum coverage limits are reasonable? What deductibles are acceptable? What coverage exclusions and limitations are acceptable?

3. Construction Premises

In the typical construction job, an owner hires a general contractor, who hires an independent contractor (*i.e.*, a subcontractor), who employs an employee. Unfortunately accidents happen in the course of construction that result in workplace injuries or even fatalities.

B. Contractual Risk Allocation

Risk allocation provisions are contained in all contracts. They are used in an attempt to assure the intended economic objectives of the "deal." The success of an entity's approach to contractual risk transfer can be considered successful if it meets the following criteria:

- Risks retained are appropriate and affordable.
- Risk as an element of the overall transaction and negotiation is incorporated at the onset.

- Indemnity, insurance, and other pertinent conditions are not so onerous that contact negotiations drag on unnecessarily delaying the transaction or necessitating the use of second-rate service providers to accomplish the contract's purpose.

- Contractual conditions allocating risk are not so onerous that a court disallows their operation at a future point in time.

- Insurance requirements are clear, using recognized terms that can be interpreted both at the time the contract is negotiated and in possible future disputes.

- Insurance and other support for the indemnity is in place when a loss occurs.

- A thorough insurance monitoring process keeps the transferee in compliance with the insurance requirements.

- The performance of the contract is monitored and regularly evaluated.

C. Absence of Contractual Risk Allocation – the Common Law and Statutory Allocation Schemes

The common law allocates risks in the absence of contractual risk allocation.

1. Activities and Locations

a. Premises

(1) Premises Liability

In *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 649, 644 (Tex. 2016) the Texas Supreme Court reviews the relationship between premises liability and general tort liability, stating

> Depending on the circumstances, a person injured on another's property may have either a negligence claim or a premises liability claim against the owner….When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. *Id.* When the injury is the result of the property's condition rather than an activity, premises-liability principles apply. *Id.* Although premises liability is itself of negligence law, it is a "special form" with different elements that define a property owner or occupant's duty with respect to those that who enter the property. *Id.*

A premises liability claim encompasses a nonfeasance theory of negligence based on the failure of the owner or occupier or controller to take reasonable measures to make the premises reasonably safe. [1] The elements of a premises liability claims are the following:

- The cause of the injury is a condition of the property.

- The condition existed prior to the accident.

- The condition posed a general, unreasonable danger to all working on the premises, rather than a specific danger to a person performing a particular activity. [2]

(2) Care, Custody or Control

The Texas Supreme Court in *Wilson v. Tex. Parks & Wildlife Dep't*, 8 S.W.3d 634, 635 (Tex. 1999 per curiam) observed

> As a rule, to prevail on a premises liability claim, a plaintiff must prove that the defendant possessed – that is, owned, occupied, or controlled - the premises where injury occurred.

Of these circumstances, **control** of the premises is the key element for premises liability. [3] "Possession," "Ownership" or "occupancy"[4] of property though needs to also involve an element of control except in circumstances of strict liability.

(3) Leases

An owner that leases a premises generally owes not duty to tenants or their invitees for unreasonably dangerous conditions on leases premises. Generally under a lease, the lessor transfers possession and control of the leased premises to the lessee. [5] See further discussion below as to Leases and Leased Premises.

(4) Easements

An easement holder is considered to be an owner, occupier or controller of premises for purposes of premises liability. [6]

(5) Construction Site

Generally a property owner does not owe a duty to ensure that an independent contractor performs its work in a safe manner.[7] See further discussion below of Construction and Construction Sites.

Texas has enacted a statutory screen for premises liability of a property owner [8] for certain personal injuries, deaths or property damage occurring on construction sites. TEX. CIV. PRAC. REM. CODE ANN. §95.003 Liability for Acts of Independent Contractors provides:

> A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:
>
> (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
>
> (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

TEX. CIV. PRAC. REM. CODE ANN. §95.001 Applicability provides:

> This chapter applies only to a claim:
>
> (1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and
>
> (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

Note that Chapter 95 does not apply to everyone injured on a construction site. It expressly applies on to contractors, subcontractors, and their employees who construct, repair, renovate or modify an improvement. The statute does not apply to other persons injured on the construction site. When Chapter 95 applies, it is the claimant's exclusive remedy, and all common law claims are pre-empted.[9] A plaintiff has the burden to show both **control** and **actual knowledge** of the danger by the property owner in order for the property owner to have liability.[10]

b. Leases and Leased Premises

(1) Maintenance

(a) If Landlord Does Not Retain Control of Portion of Premises

Under the traditional common law rule, a landlord was not required to make any repairs (including structural repairs) to the premises during the lease term, unless the lease expressly obligated landlord to do so. As the Texas Supreme Court put it nearly 70 years ago:

> The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended. A covenant is never implied that the [landlord] will make any repairs. The obligation to make repairs is a very important element of a lease contract. The parties were free to contract with respect to this obligation as they desired.

Yarbrough v. Booher, 174 S.W.2d 47, 49 (Tex. 1943); *see also Medlin v. Havener*, 98 S.W.2d 863, 864 (Tex. Civ. App.–Fort Worth 1936, no writ) stating that

> in the absence of a special contract to the contrary, and in the absence of fraud and deceit inducing the [tenant] to believe the landlord would make such repairs, the [landlord] is under no implied obligation to the [tenant] to keep the rented premises in a

> condition safe and suitable for the uses to be made of the demised premises by the [tenant].

Thus, at common law, a landlord generally had no implied duty to tenant (in contract or implied from the parties' relationship) or to third parties (in tort for premises liability) to keep the premises in good condition, absent either the express obligation to do so in the lease or landlord's exercise of control of conditions within the premises. *See Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285 (Tex. 1996) holding that a landlord has no duty to tenant or its invitees for dangerous conditions on the leased premises, unless the landlord: (1) makes negligent repairs; (2) conceals defects in premises of which landlord is aware; or (3) retains control over that portion of premises where a defect or unsafe condition causes injury. Thus, it has been said "[a]bsent a covenant, or evidence of concealment or misrepresentation, the landlord [is] not liable for a latent structural defect…within premises that causes damage to tenant's property." [11]

Repairs Gratuitously Made by Landlord

Ordinarily, a landlord who voluntarily makes repairs is not estopped from claiming that it had no such duty. The fact that a landlord voluntarily or gratuitously makes repairs constitutes neither an admission or evidence of a duty to make such repairs, nor does it operate to create a new or collateral agreement to do so. *See Yarbrough v. Booher*, 174 S.W.2d 47, 48-49 (Tex. 1943); *In Morton v. Burton-Lingo Co.*, 150 S.W.2d 239, 241(Tex. 1941) the Texas Supreme Court held that a landlord is not bound to make repairs or to pay for repairs that may have been made by the tenant and that "[t]he mere relation of landlord and tenant creates no obligation on the part of the landlord to repair or keep in repair the leased premises". The court in *Kallison v. Ellison*, 430 S.W.2d 839, 840 (Tex. Civ. App.—San Antonio 1968, *no writ*) held that evidence of repairs gratuitously undertaken by the lessor is not sufficient, standing alone, to establish the existence of an agreement to repair. The court in *Dalkowitz Bros. v. Schreiner*, 110 S.W. 564, 565 (Tex. Civ. App. 1908, no writ) held that, although a landlord had no express or implied duty at common law to tenant to repair a leaky roof in a single tenant building, once the landlord undertook a repair, the landlord was required to use due care and was, therefore, liable for damage to tenant's property caused by a leak in the new roof.

Implied Warranty of Suitability

The traditional common law rules governing the limitations on a landlord's duty to its tenant to repair and maintain leased premises partially gave way to an implied warranty of suitability in 1988. In *Davidow v. Inwood N. Prof'l Group-Phase I*, 747 S.W.2d 373 (Tex. 1988), the Texas Supreme Court held that there is an implied warranty of suitability that the premises in a commercial lease are suitable for their intended commercial purpose. The court states

> This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control. *Id*. at 376-77.

(b) If Landlord Retains Control of Portion of Premises

When the landlord retains possession or control of a portion of the leased premises, the landlord, in absence of any agreement to contrary, has an implied duty to the tenant to maintain the retained portion of the premises "so as not to damage the tenant." [12] A landlord has an implied contractual duty – even when a lease is silent – to its tenant, as well as a legal duty to third parties sounding in tort, to keep common areas and other facilities within the landlord's control in good repair and condition. The Texas Supreme Court in *Brown v. Frontier Theatres, Inc.*, 369 S.W.2d 299, 303 (Tex. 1963) held that when a landlord retains possession or control of a portion of the leased premises, the landlord is charged with a duty of ordinary care in maintaining the portion retained so as not to damage the tenant.

(c) Multi-Tenant Building

In the absence of an agreement to the contrary in a lease for space in a multi-tenant building

> consisting of a number of different apartments… divided among several tenants, each one of whom takes a distinct portion and

> none of [whom] rent the entire building, the rule must then be applied so as to make each tenant responsible only for so much [of the building] as his lease includes, leaving the landlord liable for every part of the building not included in the actual holding of any one tenant. *O'Connor v. Andrews*, 16 S.W. 628, 629 (Tex. 1891).

(d) Tenant's Obligation is Not to Commit Waste

In the absence of express repair and surrender covenants, a tenant has an implied obligation not to commit waste. The Texas Supreme Court in *R. C. Bowen Estate v. Continental Trailways, Inc.*, 256 S.W.2d 71, 72-73 (Tex. 1953) held that the implied covenant against waste arises from the landlord-tenant relationship, and unless superseded by an express covenant, obligates the tenant "to make such repairs as are necessary to preserve the property in the condition in which it was when rented, reasonable wear and tear excepted[.]" The court in *King's Court Racquetball v. Dawkins*, 62 S.W.3d 229, 233 (Tex. App.—Amarillo 2001, no pet.) noted that a covenant against waste is "the implicit duty of a tenant to exercise reasonable care to protect the leased premises from injury other than by ordinary wear and tear". [13]

(e) Express Covenant to Pay for Repairs not Covenant to Make Repairs

At common law, a covenant to make repairs is distinct from the covenant to pay for them, and an agreement to pay for a repair does not itself impose an active duty to make a repair. The court in *National Living Ctrs., Inc. v. Cities Realty Corp.*, 619 S.W.2d 422, 424 (Tex. App.—Texarkana 1981, *no writ*) held "[a] covenant to pay for repairs is distinct from the covenant to make repairs, and such an agreement does not impose upon the landlord any active duty to repair…" and held that a clause providing "any alterations or repairs, required for said licensing will be at the expense of the Lessor…" did not impose affirmative duty on landlord to make needed repairs.

(2) Casualty Loss

(a) Tenant Takes the Risk

At common law, the destruction of the improvements on leased property did not relieve the tenant of its obligation to pay rent or give the tenant the right to terminate the lease. [14]

(b) Landlord Bears Risk of Decline in Improvements not Restored

At common law, neither the landlord nor the tenant is obligated to repair the premises after casualty damages unless it caused the damage; the lease continues in effect, and the rent is not reduced or abated. In order to use the premises, the tenant is put to the burden of restoring the premises to useful condition. If the lease does not obligate the landlord or the tenant to restore the premises after a casualty loss, and the loss is not caused by the negligence of either party, the landlord bears the risk of the decline in value of the property if either it or the tenant does not restore the property.

(c) Tenant Liable for Negligently Caused Damage

The tenant is liable to the landlord, if the tenant negligently destroys the premises (*e.g.*, a negligently caused fire) absent a provision in the lease to the contrary. *Nagorny v. Gray*, 261 S.W.2d 741 (Tex. Civ. App.—Galveston 1953, *no writ*).

2. Indemnity Absent Contractual Indemnity

a. Common Law

Early English and American courts refused to adjust the financial burdens between defendants who were regarded by the court as being equally blame worthy. Therefore, joint tortfeasors who were in "***pari delicto***" had no rights to contribution at common law from other joint tortfeasors, each tortfeasor being jointly and severally liable. However, courts held that they had the power in equity to aid a tortfeasor who was relatively blameless by granting indemnity ("**common law indemnity**"). Prior to 1980, Texas courts viewed the availability of common law indemnity between jointly liable defendants based on whether: (1) the court viewed the defendants as being equally at fault (*i.e.*, in *pari delicto*) or (2) the defendants were not equally at fault (not in pari delicto) with common law indemnity being allowed on a case-by-case basis ("an all or nothing approach to indemnification"). Courts envisioned two torts: one tort committed by the defendants against the plaintiff, the second committed by one of the defendants against the other, which gave rise to court-made indemnity.

b. Statutory Allocation

(1) 1917 Statute

The legislature enacted statutes in 1917 and 1973 establishing rights of contribution between certain jointly liable tortfeasors. In 1917 Texas enacted its first statutory contribution scheme for tort actions, which survives today in Chapter 32 of the Texas Civil Practice and Remedies Code (the "**1917 Statute**" and as amended "**Chapter 32**"). TEX. CIV. PRAC. & REM. CODE ANN. §§ 32.001 to 32.003.

(2) 1973 Statute

In 1973, Texas adopted a comparative negligence statute that also governed contribution in pure negligence cases. Later enactments and amendments extend the comparative responsibility scheme, including contribution claims, to virtually all tort actions (the "**1973 Statute**" and as amended "**Chapter 33**"). TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001 *et seq.*

(3) Court Intervention

In **1980** the Texas Supreme Court in *B & B Auto Supply, Sand Pit, and Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814 (Tex. 1980) held that there could not be common law indemnity due to the adoption of the Comparative Negligence and Contribution Statute in 1973. Texas courts have held that Texas' comparative negligence statutes abolished the common-law doctrine of indemnity between negligent tortfeasors. In **1984** the Texas Supreme Court felt compelled, due to continued inaction of the Texas legislature, to enact by judicial fiat in *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414 (Tex. 1984) its own comparative and contribution scheme to compare the fault or causation of defendants where one or more of the defendants were held liable on theories of negligence, strict liability and breach of contact.

(4) Comparative Responsibility and Apportionment

In **1987**, the Texas legislature enacted "**tort reform**" amendments to the Civil Practice and Remedies Code (the "**1987 Statute**"), the genesis of today's Comparative Responsibility and Apportionment legislative risk allocation scheme. The common law principle of joint and several liability for the damages resulting from an "indivisible wrong or tort" was replaced under the 1987 Statute with the "tort reform" concept that a defendant is generally liable

> only for the percentage of the damages found by the trier of fact equal to that defendant's **percentage of responsibility** with respect to the personal injury, property damage, death, or other harm for which the damages are allowed. TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a).

(5) 1995 Statute

Again, in **1995** the Texas legislature enacted further significant "tort reform" amendments to Chapter 33 of the Civil Practice & Remedies Code (the "**1995 Statute**").

c. Sole Vestige of Common Law Indemnity – Vicarious Liability

The only remaining vestige of common law indemnity involves liability of a purely vicarious nature. An example of pure vicarious liability is a case where an employer, without independent fault, is held responsible for the torts of its employees that were committed within the scope of their employment. Under this circumstance, the employer has a right to bring an action against an employee to recover the full amount of damages that the employer paid as a result of the employee's conduct. *South Austin Drive-In Theatre v. Thompson*, 421 S.W.2d 933, 348 (Tex. Civ. App. – Austin 1967, *writ ref'd n.r.e.*).

3. Waiver of Subrogation Absent Contractual Waiver of Subrogation

a. Majority Rule: Implied Co-Insured Negates Equitable Subrogation

In circumstances where the lease does not contain a waiver of claims and a waiver of subrogation, the insurer's right to recover against a person other than its insured rests on the basic principle of law, **equitable subrogation**. A majority of courts follow the rule that a lessor's property insurer may not subrogate against a lessee whose negligence has caused damage to the lessor's property. These courts have found that the lessee is an **implied coinsured**.

Some of these courts have concluded that the landlord's agreement to procure property insurance covering the building implies an obligation by the landlord to insure the building for the benefit of both the landlord and the tenant. Others of these courts have reasoned that the tenant has indirectly paid for the insurance, either through rent or through expense pass through. The better practice is to address this risk in the lease.[15]

b. Minority Rule: No Implication of Co-Insured Status

Texas follows the <u>minority</u> rule. [16] The minority jurisdiction rule is based on the common-law presumption that a tenant is liable for the tenant's own negligence and the equitable principle of subrogation. Upon payment by the landlord's insurer for an insured property loss, the landlord's insurer is subrogated to the landlord's rights and claim against its tenant and can sue the tenant to recoup the insurance proceeds. In *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956), the Texas Supreme Court held that where the lease merely provided that the landlord agreed to carry fire and extended coverage insurance on the building, part of which was occupied by the landlord, there was no duty on the landlord to procure insurance for the benefit of the tenant, and the landlord's insurers were not precluded from obtaining a subrogated cause of action to recoup its policy proceeds on account of fire caused by the tenant's negligence. The court rejected the tenant's contention that the intent of the parties for including a covenant of the landlord to insure its own building (presumably the cost of which was built into the rent) was to exculpate the tenant for its own negligence.

D. Common Contractual Means of Allocating Risk

1. <u>The Protecting Party and Protected Party</u>

Every provision of a lease or contract is either (a) restating the rule that would be supplied by the court in the absence of the provision (the "**common law**") or is supplied by statute or (b) is expressly shifting a risk from one party (the "**party to be protected**") to the other (the "**protecting party**"), to the extent not prohibited by common law and statute.

2. Three Legged Stool – Contractual Indemnity, <u>Insurance and Waiver of Subrogation</u>

The most common method of risk management are through contractual provisions for (1) **contractual indemnity**, (2) **insurance**, and (3) **contractual waiver of subrogation** (aka the "**three legged stool**"). Neglecting any one of these three risk management legs may result in a failed risk management program.

E. Appendix of Forms and Commentary

Included in this article is an Appendix of Forms. In the Appendix of Forms are

- two forms of insurance specifications employed in leases: a typical narrative style set out in the body of the lease and a checklist style chart set out as an exhibit to a lease; and the 2017 AIA Insurance Exhibit; [17]
- risk management provisions in the Retail Lease form contained in the Texas Real Estate Forms Manual (3rd Ed. 2017) of the State Bar of Texas ("**Manual's Retail Lease**"), including the insurance, indemnity and waiver of claims/waiver of subrogation provisions, and its companion Insurance Addendum ("**Manual's Insurance Addendum**"); [18]
- insurance industry standard insuring forms ("**ISO Forms**") and standard certificates of insurance ("**ACORD Forms**");[19] and
- samples of a liability insurer's manuscripted additional insured forms ("**Manuscripted Forms**).[20]

Following the Appendix of Forms are Endnotes setting out a Commentary on the risk or peril addressed in the insurance forms, and the form's coverage limitations and exclusions.

II. INDEMNITY 101 AND INSURANCE 101 [21]

A. The Three Legged Stool

Every provision of a lease or contract is either (a) restating the rule that would be supplied by the court in the absence of the provision (the "**common law**") or is supplied by statute or (b) is expressly shifting a risk from one party (the "**protected party**") to the other (the "**protecting party**"), to the extent permitted by common law and statute. The most common method of risk management are through contractual provisions for (1) **indemnity**,[22] (2) **insurance** [23] and (3) **waiver of subrogation** [24] (aka the "**three legged stool**"). Neglecting any one of these three risk management legs may result in a failed risk management program.

B. Contractual Indemnity by a Party

An indemnity is comprised of the following elements:

1. The obligation to "indemnify" and defend.

2. The "indemnitors" (referred to in this Article as the "Protecting Party"),

3. The "indemnitees" (the referred to in this Article as the "Protected Party"),

4. The events, acts or omissions triggering Indemnified Liabilities (the "Indemnified Matters"),

5. The liabilities indemnified (the "Indemnified Liabilities"), and

6. Any excluded matters or excluded liabilities (the "Excluded Liabilities").

C. Insurance – A Contractual Indemnity By A Third Party

1. Liability Insurance

a. Some Common Types

(1) Commercial General Liability Insurance.

(a) Third Party Coverage

Commercial general liability ("**CGL**") insurance is termed "**third party coverage**" insurance as it covers liabilities incurred by the named insured to third parties and excludes injuries and damage to the insured (*e.g.*, it excludes coverage for property damage to "property you (the insured) own, rent, or occupy" [25] and to "personal property in the care, custody or control of the insured." [26]

(b) Parties

Parties to a CGL policy are the "**named insureds**" [27] including a "first named insured" if there are more than one named insured on the CGL policy, "**automatic insureds**" [28] and "**additional insureds**". [29]

(c) Insurance for Covered Liabilities Arising from an "Occurrence"

Covered liabilities or damages arise from an "**occurrence**" during the policy period which is not excluded by the Exclusions of the policy.[30] CGL insurance provides protection to the insured for amounts the insured is legally obligated to pay that are caused by physical injury, personal injury (libel or slander), advertising injury and property damage as a result of the insured's products, premises, or operations, and can be offered as a package policy with other coverages.

(d) Occurrence Policy vs. Claims Made Policy

An "**occurrence policy**" provides liability coverage only for injury or damage that occurs during the policy term, regardless of when a claim is actually made. A claim made in the current policy year could be charged against a prior policy period, or may not be covered, if it arises from an Occurrence prior to the effective date of the policy. A policy written on a "**claims made**" basis covers claims made while the policy is in effect, rather than at the time the event causing the injury or damage occurred. Thus, once a policy period has passed without a claim, if the policy is not renewed or a new policy is not issued, the insured will have no coverage for a claim filed after the policy period even if it arose prior to the end of the policy period unless "tail" coverage is purchased to cover claims made after the policy expires and within a specified number of years after the policy expires.

(e) Indemnity for Defense

The standard CGL policy provide coverage for the cost to defend and settle claims.[31]

(f) The Policy

Commercial general liability policies typically and the ISO general liability policy form,[32] which is the industry standard, is comprised of the following forms:

Commercial General Liability Declarations and Schedule of Forms [33]

Commercial General Liability Form [34]

Section I - Coverages

Coverage A. Bodily Injury [35] and Property Damage [36] Liability

1. Insuring Agreement [37]
2. Exclusions [38]

Coverage B. Personal and Advertising Injury Liability [39]

1. Insuring Agreement
2. Exclusions

Coverage C. Medical Payments [40]

1. Insuring Agreement
2. Exclusions

Section II - Who Is An Insured [41]
Section III - Limits of Insurance [42]
Section IV - Commercial General Liability Conditions [43]
Section V - Definitions [44]

Amendments and Endorsements [45]

(g) Contractual Liability Insurance

The standard CGL policy (the ISO policy) provides an important additional insurance coverage for specified types of indemnities by the named insured in its contracts with third parties. This insurance coverage is provided in the standard CGL policy by virtue of

(1) a series of "defined terms" used in

(2) an "exception" (the exception for "**Insured Contracts**") to

(3) an "exclusion" to coverage (Exclusion **2.b** excluding coverage for "**Contractual Liability**") to

(4) a coverage provision in the CGL policy (Section I - Coverage A - Bodily Injury and Property Damage insuring the named insured for bodily injury and property damage liabilities). [46]

The "Insured Contract" exception to the Contractual Liability Exclusion provides coverage to the named insured for its contractual indemnity of a third party for bodily injury liability and property damage liability for five specified types of insured contracts set out in the definition of Insured Contract. [47]

(2) Business Auto Policy

A "business auto policy" ("**BAP**") is a commercial auto policy that includes auto liability and auto physical damage coverages arising from "covered autos"; other coverages are available by endorsement. Except for auto-related businesses and motor carrier or trucking firms, the business auto policy addresses the needs of most commercial entities as respects auto insurance.

(3) Workers Compensation Insurance and Employers Liability Insurance

A "**Workers Compensation and Employers Liability Policy**" is an insurance policy that provides coverage for an employer's two key exposures arising out of injuries sustained by employees. Part One of the policy covers the employer's statutory liabilities under workers compensation laws, and Part Two of the policy covers liability arising out of employees' work-related injuries that do not fall under the workers compensation statute. In most states, the standard Workers Compensation and Employers Liability Policy published by the National Council on Compensation Insurance ("**NCCI**") is the required policy form.

"**Workers Compensation insurance**" is the system by which no-fault statutory benefits prescribed by state law are provided by an employer to an employee (or the employee's family) due to a job-related injury (including death) resulting from an accident or occupational disease. The standard workers compensation and employers liability policy used in most states was substantially revised in 1984 and again to a lesser extent in 1992. As compared to the previous 1954 policy, these revisions included some slight changes in terminology and coverage approaches that should be reflected in contract insurance requirements. One of these was a change in the name from "workmen's compensation" to "Workers Compensation." Another more important change was the inclusion of "other states coverage" in the basic Form and the elimination of the "broad form all states" endorsement, which was previously used to provide this coverage. Workers compensation coverage is usually written in tandem with an employer's liability coverage policy. Leases and construction contracts frequently require that a party "maintain Workers Compensation and Employers Liability coverage **as required by law**." Does this verbiage really require coverage? With few exceptions, Texas does not require an insured to carry Workers Compensation insurance. A statement that coverage shall be provided "as required by law" does not require that the coverage be provided.

"**Employers Liability Coverage**" provides coverage against common law liability of an employer for accidents to employees, as distinguished from liability imposed by a workers compensation law. This is provided by Part 2 of the basic workers compensation and employer's liability policy and pays on behalf of the insured (employer) all sums the insured becomes legally obligated to pay as damages because of bodily injury by accident or disease sustained by any employee of the insured arising out of and in the course of his employment by the insured. Typically triggered by a third party after the insured's employee (who is barred by workers compensation laws from suing his or her employer) sues a third party for bodily injury suffered while performing duties of his or her employment (*e.g.*, contractor's employee injured on the premises of that third party).

(4) Umbrella and Excess Liability Insurance

The following definitions are found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx.

"**Umbrella policy**": "A policy designed to provide protection against catastrophic losses. It generally is written over various primary liability policies, such as the business auto policy (BAP), commercial general liability (CGL) policy, watercraft and aircraft liability policies, and employers liability coverage. The umbrella policy serves three purposes: it provides excess limits when the limits of underlying liability policies are exhausted by the payment of claims; it drops down and picks up where the underlying policy leaves off when the aggregate limit of the underlying policy in question is exhausted by the payment of claims; and it provides protection against some claims not covered by the underlying policies, subject to the assumption by the named insured of a self-insured retention (SIR)."

"**Excess policy**": "A policy issued to provide limits in excess of an underlying liability policy. The underlying liability policy can be, and often is, an umbrella liability policy. An excess liability policy is no broader than the underlying liability policy; its sole purpose is to provide additional limits of insurance."

b. What You Did Not Know, and Could Have Known, Can Hurt You

It is the author's opinion and experience that lawyers drafting transactional documents are resistant to undertaking the effort required to understand the insurance provisions they include in their documents and to following up with their clients to assure that the drafted insurance provisions are fulfilled by the parties and their insurance brokers.[48] On occasion this resistance has risen to heated rhetoric to the effect "I only draft the provisions. I am not an insurance person. It is up to the client to understand and implement the provisions."

Perhaps this choice arises out of concern that professing some knowledge as to one's craft exposes the practitioner to a greater likelihood of being held accountable in cases where "things go wrong" than being silent. The insurance industry's forms promote taking this position. The standard certificates of insurance are simple appearing one page documents.[49] Industry forms are not readily accessible to the practitioner. Once obtained, they appear complicated.[50] They are identified by a seemingly complicated numbering system.[51] These circumstances led the author to write Insurance 101 and Insurance 201. It is the author's hope that exposure to these "traps for the unwary" will result in change in your approach to drafting insurance provisions and will lead to your more active involvement in implementing the insurance program contemplated thereby.[52]

c. Certificates of Insurance Are Not Certificates

(1) An All Too Typical Specification

Specifying appropriate insurance coverages is the first step. The next step is to confirm the insurance has been obtained and is in full force and effect. Many contracts require that a certificate of insurance be furnished as evidence of the existence of the specified insurance. The following is an all too typical specification:

> **Tenant shall provide** Landlord a certificate of insurance **certifying** the coverages required herein.

Is this sufficient? Unfortunately, **no**. Prior to 2006, the ACORD form of certificate of insurance appeared to be evidence of insurance and appeared to give rights against the insurer (including independent rights to notice upon cancellation). When ACORD changed its certificate forms in 2006 to clearly state that they conferred no rights on the certificate holder, insureds and their attorneys attempted to negotiate with insurers and agents to restore some enforceability to insurance certificates. Unfortunately, these efforts did not succeed. In response to these efforts the insurance industry approached state insurance commissioners and legislatures to gain support for their position that a certificate of insurance could not vary the underlying policy or grant rights that did not exist under the applicable policy. At last count, 42 states have either insurance regulations or statutes on this point.

The result? A certificate of insurance does not provide coverage if coverage is not provided in the underlying policy.

(2) It is Not Reasonable to Rely Upon an ACORD Certificate of Insurance

The **ACORD 25** Certificate of Liability Insurance is labeled a certificate, is addressed to a "certificate holder" and states "This is to certify that the policies of insurance listed below have been issued to the insured named above for the policy period indicated." However, it also contains the following disclaimers:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THE CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

> **THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.**

> **IMPORTANT: If the certificate holder is an additional insured, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s). If subrogation is waived, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

Many courts have held that these disclaimers effectively negate reliance by certificate holders.[53] See *e.g.,* the following statements by courts: *Bradley Real Estate Trust v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233, 1235 (N.H. 1992):

> In effect, the certificate is a worthless document; it does no more than certify that insurance existed on the day the certificate was issued. We leave it to the legislature or to future bargaining of parties to rectify inequities in the notification process.

TIG Ins. Co. v. Sedgwick James of Washington, 276 F.3d 754 (5th Cir. 2002), *aff'g* 184 F. Supp.2d 591 (S.D. Tex. 2001):

> Had Plaintiffs taken the reasonable step of obtaining a copy of (the policy) … Plaintiffs would have learned that there was no additional insured coverage in the policy at all. Thus, the Court finds that the Plaintiffs' reliance upon (the insurance broker's) representation of additional insured status was not reasonable. Accordingly, as a matter of law, Plaintiffs' claims for negligent and fraudulent misrepresentation fail.

A certificate of insurance, if incorrect, may provide a claim against the agent who issued the incorrect certificate, but it does not obligate the underwriter under the policy.[54] A claim against the agent may be of small consolation under the circumstances. [55]

d. Antiquated, Problematic and Just Plain Wrong Terminology

Even after more than 30 years since the insurance industry changed their policy forms in 1986, leases, construction contracts and other forms drafted by many lawyers still employ "antiquated, problematic and just plain wrong" terminology.

Don't Say This	***Say This***
"comprehensive general liability policy" [56]	commercial general liability policy
"blanket or broad form contractual liability coverage" [57]	contractual liability coverage
"broad form property damage" [58]	(automatically covered)
"deletion of personal injury employee exclusion"	(this exclusion no longer exists, automatically covered)
"cross liability or severability of interests endorsement"[59]	separation of insureds
"products/completed operations for 2 years following completion of the Work" [60]	(See discussion below.)

e. Additional Insureds Are Not Automatically Notified of Cancellation or Modification, and Never Notified of Non-Renewal of Coverage

Don't Say This	***Say This***
30 day notice of cancellation, amendment, reduction of limits or nonrenewal	30 day notice of cancellation

The standard ISO CGL policy provides that notice of cancellation will be provided to the first Named Insured.[61] Similarly, the ISO Common Policy Conditions, which is a component of the ISO property policy, provides that notice of cancellation is to be given only to the ***first*** Named Insured.[62] Neither the **ISO CP 12 18 06 07** Loss Payable Provisions nor the **ISO CP 12 19 06 07** Additional Insured – Building Owner endorsement issued to tenants insuring a building on leased premises provides for notice of cancellation to be given to the landlord.[63] Additional insureds are not first; they are "additional" and, therefore, the standard policy without endorsement does not commit the insurer to give notice to the additional insured if the insurer cancels the policy for nonpayment of premium or for any other reason.[64] Some but not all states permit policies to be endorsed with a "notice of cancellation" endorsement obligating the insurer to give Named Insureds other than the first Named Insured or additional insureds advance notice of policy cancellation.[65] Even in states where some form of notice endorsement has been approved by the state insurance industry regulatory body, it is difficult to get insurers to commit to give notice of cancellation to persons that are not the first Named Insured. Further, insurance companies will not provide a "notice of nonrenewal" endorsement. When any term, condition or verbiage is changed in a policy at time of renewal, that policy is technically no longer a renewal. Hence, every time there is even a minor change (and something is almost always changed), a nonrenewal notice would have to be sent. Insurance companies are unwilling to commit to such a burden and expense.

f. Not All Indemnified Liabilities Are Insured

(1) An Indemnitor is a Private Insurer

An obligation to defend, indemnify and hold harmless another party for risks other than those prescribed by law is a contractual assumption of those risks by the indemnitor. The indemnitor has *agreed* to be liable for those risks. Subject to the limits of anti-indemnification legislation, the scope of risks that can be transferred by indemnity are quite broad, potentially including the indemnitee's joint, concurrent, sole, strict and even gross negligence. Indemnification agreements can be drafted to include "any and all liabilities including fines, penalties, and all other associated expenses." Most indemnification provisions are unlimited in amount (*i.e.*, a blank check!). An indemnitor becomes a private insurer of the indemnified liabilities, but usually one under an indemnification agreement not approaching the detail of an insurance policy.

(2) Applying Contractual Liability Coverage to the Indemnification Agreement

What portion of this transferred risk is insured, or even insurable? Contractual liability insurance is the funding mechanism for a portion of the liabilities assumed by an indemnitor by its indemnity. This insurance coverage is provided in the standard CGL policy as (1) a series of definitions to (2) an exception to (3) an exclusion to (4) the coverage provision for bodily injury and property damage liability only.[66] In other words, contractual liability insurance applies to allegations of bodily injury and physical injury to tangible property, and nothing else. The application of contractual liability coverage to a broad form indemnity provides coverage for a limited portion of the indemnified liabilities. It must be kept in mind that, since insurance potentially covers so few of the exposures for which indemnification may be required, the indemnification provision is potentially bankrupting to the indemnitor. Also, you cannot assume that contractual liability coverage afforded by the standard commercial general liability policy has not been limited or even deleted by endorsement. Furthermore, there is no duty to defend an indemnitee found in the standard commercial general liability policy. When defense is required in the indemnification provision, a funny thing happens. Unlike the way costs of defense is provided in most liability coverages, costs of defense provided on behalf of an indemnitee are deemed to be damages, meaning that those costs are included in the limit of liability (not outside of or in addition to that limit) and therefore erode the limit.

g. A General Specification for "Additional Insured Status" Is Meaningless

(1) Most Common Drafting Error

Unfortunately, although additional insured coverage is the most common risk management technique, it is also the most commonly misunderstood, even by professionals in the field such as risk managers, insurance agents and lawyers. The most common error is failing to specify the coverage terms to be contained in the additional insured endorsement. Parties commonly cover the additional insured requirement by specifying

> (Named Insured) will cause its CGL insurer to list ____________ as **an additional insured** on its CGL policy.

A landlord may specify in its lease that the tenant and the tenant's contractors will cause each of their CGL insurers to list the landlord, its lender and management company as additional insureds on the tenant's and the tenant's contractors' CGL policies; a tenant may specify in its contract with its tenant-finish contractor that the contractor is to cause its CGL insurer to list the tenant, its landlord, the landlord's lender and the management company as additional insureds on the tenant-finish contractor's CGL policy; the tenant's contractor may specify in its subcontract with its subcontractors that the subcontractors list the contractor as an additional insured on the subcontractor's CGL policy. Unfortunately, in each of these cases, the person desiring protection as an additional insured has, by this wording of its insurance clause, left it up to the other party's insurance carrier to define the scope of the coverage to be provided. This is equivalent to "*letting the fox determine how, when, and if to protect the chicken.*"

A mistake has been made because there is **no** commonly accepted definition of what is an "additional insured." The above-quoted specification neither specifies the triggers to coverage nor what exclusions to coverage are to be permitted. There are literally hundreds of different additional insured endorsements in current use, each providing a different scope of coverage. Without a detailed specification of the scope of coverage to be afforded by the insurer to the additional insured, you have left it up to the insurer to select the form of additional insured coverage to provide. Simply requiring "additional insured status" may get the additional insured coverage that (1) includes both completed and ongoing operations and concurrent and sole negligence, or (2) includes only ongoing operations and excludes sole negligence of the additional insured, or (3) includes only certain ongoing operations and excludes both concurrent and sole negligence of the additional insured, and has additional exclusions added to it, or (4) innumerable additional options.

(2) What to Look For In An Additional Insured Endorsement

The most common and well recognized additional insured endorsements are drafted for use by the insurance industry by ISO, or Insurance Services Office. ISO endorsements will include a footer that reads "© ISO Properties, Inc., 20__" or © Insurance Services Office, Inc., 20__".[67]

The following are questions to be answered in reviewing an additional insured endorsement (the "**Coverage Matrix**"):

- Who? Who is being added as an additional insured?
- What? What scope of negligence is being transferred? What activity is covered (*e.g.,* operations, work, ownership, use, maintenance)?
- When? Is there a time period covered?
- Where? Is there a location covered?
- Exclusions? Are there exclusions to coverage?
- Limitations?[68]

Pay careful attention to edition date of the endorsement. Each new edition restricts coverage that was provided in previous edition. Also, confirm that the issued additional insured endorsement is the form specified in the insurance specifications. Two forms of clerical errors of an issuing agent are issuing the wrong additional insured endorsement form and assuming that an existing blanket insured endorsement form appropriately applies to the transaction (for example, the authorized representative signing the certificate of insurance may erroneously believe that the blanket additional insured endorsement attached to the policy applies to a landlord/tenant relationship, but the blanket endorsement covers an owner/contractor relationship).

h. Primary and Noncontributory Liability

Many agreements call for another party's insurance to be primary. The problem with this is that all general liability policies state that they are primary, and that, if two or more policies cover a claim, they will share in payment of that loss. The insurance industry attempted a fix to this by including a provision that states that a Named Insured's coverage is excess where that Named Insured is added to another party's coverage as an additional insured. That works fine so long as the Protecting Party hasn't also modified its additional insured coverage to be provided on an excess liability or other modified basis.

This new endorsement will resolve some problems, if the requirement for it is carefully drafted.[69]

i. Umbrella and Excess Liability

Most "**umbrella liability policies**" are not umbrellas. Most are really a form of excess liability policy. Umbrella liability policies are most recognizable by the provision of Parts A and B. Part A is the excess liability over the underlying primary liability coverages, and Part B is the "umbrella" portion. Most "**excess liability policies**" do not provide pure excess liability, meaning that the coverage provided is not usually on a following form basis. Both kinds of policies frequently include gaps with regard to such matters as additional insured status, primary and noncontributory liability, waivers of subrogation and the like.

Keep in mind that umbrella or excess liability policies provide additional limits only over those underlying liability policies specifically listed in the policy.

2. Property Insurance

a. Parties

The following is terminology used in Property Insurance Policies and their endorsements to describe various types of insured parties, each with varying rights and obligations under the Property Insurance:

(1) Insureds

In a property policy, the insured is the party identified on the Declarations Page as having an **insurable interest** in the covered property and to whom loss payments will be paid if the property is damaged or destroyed. Third parties may be designated by endorsement to the property policy as an **additional insured** to protect their **additional interests**.[70]

(2) Additional Named Insured

Unlike liability insurance policies, there may be "additional named insureds" on a property policy. The following definition of "**additional named**

insured" is found in the on-line IRMI Glossary of Insurance and Management Terms http://www.irmi.com/online/insurance-glossary/default.aspx:

> (1) A person or organization, other than the first named insured, identified as an insured in the policy declarations or an addendum to the policy declarations. (2) A person or organization added to a policy after the policy is written with the status of named insured. This entity would have the same rights and responsibilities as an entity named as an insured in the policy declarations (other than those rights and responsibilities reserved to the first named insured). In this sense, the term can be contrasted with additional insured, a person or organization added to a policy as an insured but not as a named insured. The term has not acquired a uniformly agreed upon meaning within the insurance industry, and use of the term in the two different senses defined above often produces confusion in requests for additional insured status between contracting parties.

(3) Mortgageholder

Similarly, the standard commercial property policy contains the standard mortgage clause providing that loss payments will be made to the insured and the **mortgageholder** as their interests may appear.[71]

(4) Loss Payee

A "**Loss Payable Clause**" is an insurance provision authorizing payment in the event of loss to a person or entity (a "**loss payee**") other than the named insured having an insurable interest in the covered property. See **ISO CP 12 18 06 07** Loss Payable Provisions, **Optional Clause F** Building Owner Loss Payable Clause.[72] In November 2008 ISO amended its CP 12 18 Loss Payable Provisions endorsement to permit a building owner to be designated as a loss payee under a Building Owner Loss Payable option, as an alternative to using the **CP 12 19**. Under the Building Owner Loss Payable option, covered loss to the building is adjusted with the building owner and loss to betterments is adjusted with the tenant, unless the lease stipulates otherwise. Notice of cancellation is not granted to the building owner.

b. Antiquated, Problematic and Just Plain Wrong Terminology

In 1986 the insurance industry ceased using phrases such as "**fire insurance**", "**extended coverage**", "**vandalism and malicious mischief**", and "**special extended coverage**". Introduced to take their place were policies referred to as "basic causes of loss", "broad causes of loss", and "special causes of loss". That said, the vast majority of insurers in the insurance industry no longer describe coverage as "**all-risk**" due to decisions against insurers arising out of the perception created by such terms that the policy did not include the exclusions, conditions, and limitations that all policies have.

Don't Say This	***Say This***
"fire insurance"	basic,[73] broad [74] or special causes of loss[75] form
"extended coverage"	
"vandalism and malicious mischief"	
"special extended coverage"	
"all-risk"	

Outdated terminology requiring that the policy provide "all-risks" or "fire and extended coverage" is often used in contracts. "All risks" denoted property insurance covering losses arising from any fortuitous cause except those that are specifically excluded and is currently called "Special Form" or "Special Causes of Loss Form." "Extended coverage" refers to an endorsement that was once added to a standard fire policy to cover the perils now insured under ISO's Basic Causes of Loss Form. Since the extended coverage endorsement is no longer used, a better approach to requiring this coverage is to refer to the ISO "Basic," "Broad," or "Special" Causes of Loss Form. Prior property insurance forms used the terms "risk" and "perils." Pre-"causes of loss" property insurance was written either on a "named peril" basis which insured property against loss or damage from causes of loss expressly enumerated in the policy or an "all risks" basis, which insured property against loss or damage from all causes of loss except those which were expressly excluded. "Fire and extended coverage" insurance was a named peril property insurance.

c. The Policy

Property policies, and the ISO property policy form, are comprised of a the following forms:

Commercial Property Coverage Part Declarations Page with Schedule of Forms [76]
Common Property Conditions [77]
Building and Personal Property Coverage Form [78]
- **Section A – Coverage** [79]
- **Section B – Exclusions and Limitations**
- **Section C – Limits of Insurance**
- **Section D – Deductible**
- **Section E – Loss Conditions** [80]
- **Section F – Additional Conditions** [81]
- **Section G – Optional Coverages** [82]
- **Section H – Definitions**

Business Income (And Extra Expense) Coverage Form [83]

Leasehold Interest Coverage Form [84]
- **Section A – Coverage** [85]
- **Section B – Exclusions and Limitations**
- **Section C – Limits of Insurance**
- **Section D – Loss Conditions**
- **Section E – Additional Condition**
- **Section F - Definitions**

Commercial Property Conditions [86]
Endorsements [87]

(1) Coverage under Each Causes of Loss

(a) Covered Causes of Loss

The following are the perils covered by each of the Causes of Loss Forms:

PERILS COVERED UNDER ISO CAUSES OF LOSS FORMS	
Basic Causes of loss Form (CP 10 10)	**Broad Causes of Loss Form (CP 10 20)**
• Fire • Lightning • Explosion • Windstorm or hail • Smoke • Aircraft or vehicles • Riot or civil commotion • Vandalism • Sprinkler leakage • Sinkhole collapse • Volcanic action	Basic causes of loss form perils, plus: • Breakage of glass • Falling objects • Weight of snow, ice, or sleet • Water damage from leaking appliances • Collapse from specified causes
	Special Causes of Loss Form (CP 10 30) • All perils except as excluded • Collapse from specified causes

(b) Exclusions from Causes of Loss

The following are excluded perils from Causes of Loss coverage, including from Special Causes of Loss:

- Law and Ordinance;
- Earth Movement, Governmental Action;
- Nuclear Hazard;
- Utility Service;
- War and Military Action;
- Water;
- Fungus, Wet Rot, Dry Rot, and Bacteria, Boiler and Machinery Failure;
- Wear and Tear or Lack of Maintenance;
- Continuous Seepage or Leakage Over a Period of 154 Days or More;
- Dishonest Acts;
- Pollutants; and
- Faulty Design or Workmanship.

Also, in special hazard areas certain causes of loss may be excluded from coverage by endorsement with specialty insurance being required to cover the hazard (*e.g.*, windstorm).

(2) Difference in Conditions Insurance

"**Difference in Conditions Insurance**" is the industry term for property policies purchased in addition to the Causes of Loss policy to cover perils not covered by the property policy (usually, flood, wind and earthquake).

(3) Valuation Terminology

Whether the policy is a "**Replacement Cost**" policy or an "**Actual Cash Value**" policy, the loss paid will be limited to the policy limits.

(a) Replacement Cost

"**Replacement Cost**" is the cost of repairing or replacing insured property at time of the occurrence of the loss, without reduction for loss of value through depreciation or age. Recovery is limited to the lesser of (a) the policy limit, (b) the cost to replace the lost or damaged property with other property of comparable material and quality and used for the same purpose, or (c) the amount actually spent to repair or replace the damaged or lost property. The policy proceeds are not paid until the property is actually repaired or replaced, and only if replacement occurs as soon as reasonably possible after the loss or damage. Notice of intent to replace must be given to the insurer within 180 days of loss. Replacement cost coverage does not prohibit recovery if the insured rebuilds at a new location, but the coverage is limited to what it would have cost to replace the improvements at the original premises. Replacement cost coverage does not cover the added costs of construction due to changes in laws and ordinances except if the policy is endorsed with an Ordinance or Law Coverage Endorsement (See Endnote 59 to **Insurance 201**). In the past replacement cost coverage was an option provided by endorsement. Now it is an optional coverage built into the ISO form policy. The option coverage is selected by notation on the Declarations Page. See **ISO CP DS 10 00** Declarations Page at Optional Coverages. [88]

(b) Actual Cash Value

"**Actual Cash Value**" or "**ACV**". The ISO policy does not define "actual cash value". The definition of this term is left up to case law. The term has generally been defined by cases to mean replacement cost of the covered property at the time of loss with like-kind and quality less physical depreciation. Depreciation may be determined by consideration of age, condition at time of loss, obsolescence and other factors causing deterioration. The term is seldom defined in the policy, but is used in property and automobile physical damage insurance and is generally considered in the industry to be the cost to repair or replace the damaged property with materials of like kind and quality, less depreciation of the damaged property. In other words, the sum of money required to pay for damages or lost property, computed on the basis of replacement value less its depreciation by obsolescence or general wear and tear (i.e., physical depreciation). This is one of several possible methods of establishing the value of insured property in order to calculate the premium and determine the amount the insurer will pay in the event of a loss. ACV coverage applies if Replacement Cost coverage is not affirmatively selected on the Declarations Page of the policy.[89]

(c) Inflation Guard

"**Inflation guard**" is an optional endorsement designed to offset potential inflation by specifying a percentage in the Declarations Page by which the coverage will increase annually as to the portion of the covered property specified.[90]

III. INSURANCE SPECIFICATION

A. Two Approaches

Included in this article are two approaches to writing insurance specifications, a narrative approach and an exhibit checklist approach. There are drafting advantages and disadvantages to each approach (one's vice is the other's virtue).

Narrative	Exhibit
General	Specific
Brief	Detailed
Paragraph Style	Checklist Style

The author encourages the use of the exhibit checklist approach. In the author's experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements.[91]

B. The Protecting Party's Insurance Broker is the Audience for the Insurance Specifications

The author urges “Remember your audience,” which this author proposes is the insurance agents issuing and reviewing the insurance to be obtained, and not only the Protecting Party’s insurance counsel. The people that most need to understand what is being required are the Protecting Party’s insurance brokers. Make it easy for them to understand. Require a specific ISO endorsement or a specific scope of coverage. If requiring a specific ISO endorsement, do not say "or equivalent". What does that mean? What it does not mean is "identical". Make the Protecting Party declare what in fact they do have. Get a copy and read it. Make sure that it complies with your insurance specifications.

The author encourages the use of the exhibit checklist approach. In the author’s experience providing a specific, detailed, checklist style set of insurance specifications facilitates delivery of insurance meeting the parties' insurance requirements. Inform your client of the severity of the exclusions that are so widely and increasingly utilized by the insurance industry, yet are invisible to most certificate holders. Inform your client that a review of the coverage being provided must be performed, either by you, your client's insurance agent, or an independent consultant.

IV. ENDNOTES

[1] **Premises Liability**. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010).

[2] **Elements of a Premises Liability Claim**. *Coastal Corp v. Torres,* 133 S.W.3d 776, 782 n. 6 (Tex. App. – Corpus Christi 2004, pet. denied).

[3] **Control**. The party that controls a premises is the party with the duty under premises liability law. "Control means the power or authority to manage, direct, govern, administer , or oversee. *American Fid. & Cas. Co. v. Traders & Gen. Ins. Co.,* 334 S.W.2d 772, 775 (Tex. 1960).

[4] **Possession or Occupancy with Control**. The occupier of premises is generally the party in control of the premises. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 324 (Tex. 1993); *Liberty Mutual Fire Insurance Company*, 446 S.W.3d 835, 846 (Tex. App. – San Antonio, no pet.). See

> A **possessor** of land is
> (a) a person who is in occupation of the land with intent to control it, or
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a and (b).
>
> RESTATEMENT (SECOND) OF TORTS § 328E (1965).

[5] **Leases and Premises Liability**. *Johnson County Sheriff's Posse, Inc. v. Endsley,* 926 S.W.2d 284, 285 (Tex. 1996); *City of Irving v. Seppy*, 301 S.W.3d 435, 445-46 (Tex. App. – Dallas 2009, no pet.).

[6] **Easements and Premises Liability**. *Delhi-Taylor Oil Corp v. Henry*, 416 S.W.2d 390, 392 (Tex. 1967).

[7] **Construction Site**. *Gen. Elec. Co. v. Moritz,* 257 S.W.3d 211, 214 (Tex. 2008). See further discussion below of Construction and Construction Sites.

[8] **Chapter 95 Applicable to Owners of Commercial or Business Purpose Property But Not Applicable to Tenants or Other Occupiers of Property**. TEX. CIV. PRAC. REM. CODE ANN. § 95.001 Definitions provides

> (1) "Claim" means a claim for damages caused by negligence, including a counterclaim, cross-claim, or third party claim.
> (2) "Claimant" means a party making a claim subject to this chapter.
> (3) "**Property owner**" means a person or entity that **owns** real property primarily used for commercial or business purposes.

[9] **Chapter 95 Pre-emption of Common Law Claims**. *Abarca v. Scott Morgan Residential, Inc.,* 305 S.W.3d 110, 126 (Tex. App. – Hou. [1st Dist.] 2009, pet. denied).

[10] **Both Control and Actual Knowledge Required**. *Moreno v. BP America Production Co.,* 2008 WL 4172248 at p. 2 (Tex. App. – San Antonio 2008, pet. denied) – "An owner may be aware of the danger, but exercise no control, or he may exercise control and have no actual knowledge of the danger; in each instance, the owner is statutorily shielded from liability."

[11] **Older Common Law – Absent Misrepresentation Landlord Not Liable for Latent Defect**. *American Exch. Nat'l Bank v. Swope & Mangold*, 101 S.W. 872, 873 (Tex. Civ. App. 1907, *no writ*).

[12] **Landlord Retains Control of Portion of Premises**. *McCreless Props., Ltd. v. F. W. Woolworth Co.*, 533 S.W.2d 863, 866 (Tex. Civ. App.–San Antonio 1976, writ ref'd n.r.e.).

[13] **Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect**. *See generally* C. R. McCorkle, Annot., *Liability of Tenant for Damage to the Leased Property Due to His Acts or Neglect*, 10 A.L.R.2d 1012 covering cases in which landlord seeks to recover damages for specific injuries to property due to a tenant's own acts or negligence as distinguished from cases in which tenant's liability is predicated upon breach of duty to keep property in repair or to return it in good condition; and C. Jhong, Annot., *Measure of Damages in Landlord's Action for Waste Against Tenant*, 82 A.L.R.2d 1106 covering cases dealing with landlord's measure of damages resulting from a tenant's violation of its implied duty to care for leased property as distinguished from cases concerned with damages resulting from violation of an express covenant to keep property in repair, to use it for a certain specific purpose, or to return it in good condition.

[14] **Tenant Takes Risk of Casualty Loss**. *Mitchell's Inc. v. Nelms*, 454 S.W.2d 809, 813 (Tex. Civ. App.—Dallas 1970, writ ref d n.r.e.).

[15] **Majority Rule – Implied Coinsureds.** See FRIEDMAN ON LEASES (5th ed. 2011), § 9.11. INSURANCE LAW, Keeton and Widiss, §4.4(b). *Metal Works, Inc. v. North Star Reinsurance Corp. v. Continental Ins. Co.*, 624 N.E.2d 647 (1993); *Cook Paint & Varnish Co.*, 418 F.Supp 56 (N.D. Tex. 1976); *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975).

[16] **Texas – Minority Rule.** *Wichita City Lines, Inc. v. Puckett*, 295 S.W.2d 894 (Tex. 1956); FRIEDMAN ON LEASES (5th ed. 2011), § 9.12 *No Implication of Co-Insured Status Unless Explicitly and Unambiguously Stated Otherwise in the Lease*.

[17] **Forms – Insurance Specifications.** See Chapter 5 Forms and Commentary.

[18] **Forms – Texas Real Estate Forms Manual – Retail Lease.** See Chapter 5 Forms and Commentary.

[19] **Forms – Insurance Industry Forms.** See Chapter 5 Forms and Commentary

[20] **Forms – Manuscripted Insurance Forms.** See Chapter 5 Forms and Commentary

[21] **Texas Real Estate Forms Manual**. The Manual has the following discussion of indemnities in Texas:

§ 17.2 Indemnities and Waivers

§ 17.2:1 Types of Indemnities and Waivers

Insurance professionals sometimes describe indemnities as being "limited," "intermediate," or "broad."

1. A limited indemnity clause imposes liability on the indemnitor only to the extent of the indemnitor's fault or negligence and is the most favorable type of indemnity clause for an indemnitor.
2. Under an intermediate indemnity clause, the indemnitor assumes all liability except for the sole negligence of the indemnitee.
3. A broad-form indemnity clause imposes the entire risk of loss on the indemnitor, including the sole negligence of the indemnitee, and is the most favorable type of indemnity clause for an indemnitee.

§ 17.2:2 Drafting Considerations for Indemnities and Waivers

1. Does the party giving the indemnity or waiver have the authority or capacity to enter into the indemnity or waiver? (See section 17.2:3 below.)
2. What is the creditworthiness of the indemnitor? Is a guaranty, a surety bond, or insurance necessary?
3. Should persons other than the contracting parties (for example, shareholders, directors, officers, employees, contractors, or subcontractors) benefit from the indemnity or waiver?
4. Will liabilities arising out of the acts or omissions of persons other than the party giving the indemnity or waiver (for example, employees, agents, and contractors) be subject to the indemnity or waiver?
5. Is the recovery against the party giving the indemnity or waiver limited as to amount, ability to seek a deficiency judgment, or source of funds to pay damages?
6. What risks are covered by the indemnity or waiver?
7. Is the indemnity or waiver consistent with insurance coverages carried by the parties, both as to amounts and risks insured?
8. Is the obligation to defend and the entire cost of defense included in the indemnity? If so, will the beneficiary of the indemnity be entitled to separate counsel of its choosing?
9. Are there any types of damages (for example, punitive or consequential) that are excluded?
10. Are there any limitations as to the time period the indemnity or waiver will be in effect or the time period for making a claim under the indemnity or waiver?
11. Do any anti-indemnity statutes apply? (See section 17.2:4 below.)
12. Is compliance with the fair notice doctrine necessary? (See section 17.2:5 below.)

§ 17.2:3 Indemnities by Cities and Counties Prohibited

The Texas Constitution states that no debt for any purpose may be incurred by any city or county unless provision is made at the time of creating the debt for levying and collecting a sufficient tax to repay the debt. *See* Tex. Const. art. XI, §§ 5, 7. Because an indemnity is by its nature uncertain as to the timing and amount of the liability that could be incurred, an indemnity by a city or county is invalid. *See T, & N.O.R.R. Co. v. Galveston County,* 169 S.W.2d 713 (Tex. 1943).

§ 17.2:4 Anti-Indemnity Laws

With some exceptions, Texas Insurance Code chapter 151 prohibits broad-form and intermediate indemnities in construction contracts and requirements in a construction contract for insurance policies or endorsements that cover broad-form or intermediate indemnities. Under Tex. Ins. Code § 151.102, an indemnity in a construction contract, or in an agreement collateral to or affecting a construction contract, is void and unenforceable to the extent that it requires an indemnitor to indemnify a party, including a third party, against a claim caused by the negligence or fault, violation of a law, or breach of contract of the indemnitee, its agent or employee, or any third party under the control or supervision of the indemnitee, other than the indemnitor or its agent, employee, or subcontractor of any tier. Under Tex. Ins. Code **§** 151.104, a provision in a construction contract that requires the purchase of additional insured coverage or any coverage endorsement or provision within an insurance policy providing additional insured coverage is void and unenforceable to the extent that it requires coverage that is prohibited under Tex. Ins. Code § 151.102.

The definition of a "construction contract" contained in Tex. Ins. Code § 151.001(5) is extremely broad, including any "contract, sub-contract, or agreement . . . made by an owner . . . for the design, construction, alteration, renovation, remodeling, repair, or maintenance of . . . a building, structure, appurtenance, or other improvement to or on . . . real property." Whether the definition covers a lease that contemplates leasehold improvements or contains provisions regarding repairs, maintenance, or alterations is, at best, unclear.

Among the exceptions under Insurance Code chapter 151 are the following:

1. There is a broad exception for any provision in a construction contract that requires a party to indemnify, hold harmless, or defend another party to the construction contract or a third party against a claim for the bodily injury or death of an employee of the indemnitor, its agent, or its subcontractor of any tier (that is, so-called third-party-over actions). Tex. Ins. Code § 151.103.
2. Indemnity provisions contained in loan and financing documents other than construction contracts to which the contractor and owner's lender are parties. Tex. Ins. Code § 151.105(3).
3. An indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code § 151.105(10).

Texas law also prohibits certain indemnities by a contractor with respect to an architect's negligence and certain indemnities by an architect with respect to an owner's negligence. *See* Tex. Civ. Prac. & Rem. Code § 130.002.

§ 17.2:5 Fair Notice Doctrine

Even if no anti-indemnity statute applies, when an indemnity, release, or waiver provision seeks to shift the risk of one party's future negligence or other fault to the other party, Texas imposes a fair notice requirement before enforcing that agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993). The fair notice requirements are set out as the express negligence doctrine and the conspicuousness requirement. *Storage & Processors, Inc. v. Reyes,* **134 S.W.3d 190, 192 (Tex. 2004).** The fair notice requirement is a rule of contract interpretation and is therefore determinable as a matter of law. *Fisk Electric Co. v. Constructors & Associates,* 888 S.W.2d 813, 814 (Tex. 1994).

Express Negligence Rule: If the parties to a contract want to indemnify one of the parties against its own negligence, the parties must express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Daniel Construction Co.,* 725 S.W.2d 705, 707-08 (Tex. 1987). This same rule applies to releases. *Dresser Industries, Inc.,* 853 S.W.2d 505. There is no specific required language to use to comply with the express negligence doctrine in Texas, other than use of the terms *negligence* or *fault,* but a good example to follow states: "TENANT WILL RELEASE, DEFEND, AND INDEMNIFY LANDLORD [AND ANY OTHER INDEMNI-TEES] FROM ANY CLAIM OR LOSS EVEN THOUGH CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR OTHER LEGAL FAULT OF LANDLORD [OR ANY OTHER INDEMNI-TEES]." Whether a release or indemnity for gross negligence is enforceable is unclear, but any release or indemnity intended to apply to gross negligence may need to specifically mention gross negligence to meet the express negligence test. *Van Voris v. Team Chop Shop, LLC,* 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.).

Conspicuousness Rule: The indemnity, release, or waiver provision indemnifying or releasing a party from its own negligence must be conspicuous (for example, a separate indemnity and waiver provision in contrasting, capitalized, or colored type with a clear and informative heading). *Dresser Industries, Inc.,* 853 S.W.2d at 510-11.

Extensions of Fair Notice Doctrine: The fair notice doctrine has also been held to apply to indemnities or waivers—for strict liability *(Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.,* 890 S.W.2d 455, 459 (Tex. 1994)) and of a third party by a subscribing employer notwithstanding the exclusive recovery (or one action) rule under the Workers' Compensation Act *(Enserch Corp. V. Parker,* 794 S.W.2d 2, 9 (Tex. 1990)).

§ 17.2:5 Fair Notice Doctrine

Even if no anti-indemnity statute applies, when an indemnity, release, or waiver provision seeks to shift the risk of one party's future negligence or other fault to the other party, Texas imposes a fair notice requirement before enforcing that agreement. *Dresser Industries, Inc. v. Page Petroleum, Inc.,* 853 S.W.2d 505, 508 (Tex. 1993). The fair notice requirements are set out as the express negligence doctrine and the conspicuousness requirement. *Storage & Processors, Inc. v. Reyes,* 134 S.W.3d 190, 192 (Tex. 2004). The fair notice requirement is a rule of contract interpretation and is therefore determinable as a matter of law. *Fisk Electric Co. v. Constructors & Associates,* 888 S.W.2d 813, 814 (Tex. 1994).

Express Negligence Rule: If the parties to a contract want to indemnify one of the parties against its own negligence, the parties must express their intent in specific terms within the four corners of the contract. *Ethyl Corp. v. Daniel Construction Co.,* 725 S.W.2d 705, 707-08 (Tex. 1987). This same rule applies to releases. *Dresser Industries, Inc.,* 853 S.W.2d 505. There is no specific required language to use to comply with the express negligence doctrine in Texas, other than use of the terms *negligence* or *fault,* but a good example to follow states: "TENANT WILL RELEASE, DEFEND, AND INDEMNIFY LANDLORD [AND ANY OTHER INDEMNITEES] FROM ANY CLAIM OR LOSS EVEN THOUGH CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE (WHETHER SOLE, JOINT, OR CONCURRENT), STRICT LIABILITY, OR OTHER LEGAL. FAULT OF LANDLORD [OR ANY OTHER INDEMNITEES]." Whether a release or indemnity for gross negligence is enforceable is unclear, but any release or indemnity intended to apply to gross negligence may need to specifically mention gross negligence to meet the express negligence test. *Van Voris v. Team Chop Shop, LLC,* 402 S.W.3d 915 (Tex. App.—Dallas 2013, no pet.).

Conspicuousness Rule: The indemnity, release, or waiver provision indemnifying or releasing a party from its own negligence must be conspicuous (for example, a separate indemnity and waiver provision in contrasting, capitalized, or colored type with a clear and informative heading). *Dresser Industries, Inc.,* 853 S.W.2d at 510-11.

Extensions of Fair Notice Doctrine: The fair notice doctrine has also been held to apply to indemnities or waivers—for strict liability *(Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway Co.,* 890 S.W.2d 455, 459 (Tex. 1994)) and of a third party by a subscribing employer notwithstanding the exclusive recovery (or one action) rule under the Workers' Compensation Act *(Enserch Corp. v. Parker,* 794 S.W.2d 2, 9 (Tex. 1990)).

[22] **Indemnity.** See Chapter 3 Indemnity 201 Common Law Indemnity and Contractual Indemnity by Party; and see Locke, State Bar of Texas, 28th Annual Advanced Real Estate Drafting Course, Drafting Indemnities and their Relationship to Insurance (Houston, Texas, March, 2017).

[23] **Insurance 101 and 201**. This article and presentation on insurance is presented from the author’s perspective and experience as a real estate lawyer. This article addresses the insurance leg on a “101” level, addressing some of the basic concepts and terminology involved in

commercial real estate transactions. Included in this article is Chapter 3 "**Insurance 201**," which addresses these concepts and terminology on a more detailed and applied level. References are made in this article to Insurance Specifications and the forms attached in the **Forms** attached to Chapter 5 Forms and Commentary. The Commentary on Insurance Forms are Endnotes annotating the Insurance Specifications and the forms in the appendix of Forms.

24 **Waiver of Subrogation.** See Chapter 3 Insurance 201 at Common Law Waiver of Subrogation and Contractual Waiver of Subrogation.

25 **Owned, Rented and Occupied Property Exclusions from CGL Coverage.** See Exclusion 2.j(1) of the ISO Commercial General Liability Coverage Form in Chapter 5.

26 **Personal Property in Insured's Care, Custody or Controlled Exclusion.** See Exclusion 2.j(4) of the ISO Commercial General Liability Coverage Form in Chapter 5.

27 **Named Insureds.** The Declarations Page of a liability policy names the person or organization who is the insured and such person or organization is the "**named insured**". If more than one person or organization is named in the Declarations Page as an insured, the first person or organization named is the first named insured. See ISO Commercial General Liability Declarations (aka the "**Declarations Page**") in Chapter 5.

28 **Automatic Insureds**. Additionally, the liability policy may identify other persons or organizations who qualify as insureds on the basis of their relationship to the named insured. For example, a liability policy on which an organization is the named insured, may provide that the organization's employees are automatically covered and are automatic insureds. The standard CGL policy designates the following persons as automatic insureds: the spouse of an individual named insured; partners and joint venturers in a named insured partnership or joint venture; members and managers of a named insured limited liability company; officers, directors, and stockholders of a named insured corporation or other named insured organization; trustees of a named insured trust; employees and volunteer workers of the named insured business; the named insured's real estate manager; any person having proper temporary custody of a deceased named insured's property; the deceased named insured's legal representative; and newly acquired or formed organizations. See Section II – Who Is An Insured of the ISO Commercial General Liability Coverage Form in Chapter 5.

29 **Additional Insureds.** An "**additional insured**" is a person other than the named insured who is protected under the terms of the contract. Usually, additional insureds are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself. The reason for including another person might be to protect the other person because of the named insured's close relationship with that person or to comply with a contractual obligation that requires the named insured to do so (*e.g.*, owner of property leased by the named insured-landlord). Under a CGL policy many types of persons or organizations may be added by endorsement as an additional insured, upon approval of the insurer. Many liability insurers issue blanket endorsements specifying certain parties that are "automatic additional insureds" under their liability policies without the need for further endorsement to actually name the person or organization as an additional insured on the policies if the contract between the insured and the additional insured contractually obligates the insured to cause its insurer to add the person or organization as an additional insured on the insured's liability policy. A common error in liability insurance specifications is to specify that a party is to be added to the named insured's policy as an "**additional named insured**". Persons or organizations are routinely added to a CGL policy as additional insureds by endorsement. There are standard additional insured endorsements to the standard liability policy. See samples of the most commonly issued ISO additional insured endorsement forms to the ISO CGL policy in Chapter 5.

30 **ISO Definition of an "Occurrence".** The ISO CGL policy defines an "**occurrence**" in Section V – Definitions to the ISO Commercial General Liability Form in Chapter 5 as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

31 **Indemnity for Defense.** See the Insuring Agreements for Coverages A and B in the ISO Commercial General Liability Coverage Form in Chapter 5 providing

> We will have the right and **duty to defend** the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> **(1)** The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and
>
> **(2)** Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B.** (Emphasis added by author.)

32 **ISO Forms.** See the ISO Commercial General Liability Declarations and Commercial General Liability Coverage Form in Chapter 5.

[33] **Declarations Page.** See the ISO Commercial General Liability Declarations in Chapter 5.

[34] **Commercial General Liability Form.** See the ISO Commercial General Liability Coverage Form in Chapter 5.

[35] **Bodily Injury.** "**Bodily Injury**" means "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." See definition at Section V – Definitions 3. "bodily injury" to the ISO Commercial General Liability Coverage Form in Chapter 5.

[36] **Property Damage.** "**Property Damage**" means "physical injury to tangible property, including all resulting loss of use of that property ... or loss of use of tangible property that is not physically injured." See definition at Section V – Definitions 17. "property damage" to the ISO Commercial General Liability Coverage Form in Chapter 5.

[37] **Section I - Coverage A - Insuring Agreement – An Occurrence Policy.** See the ISO Commercial General Liability Coverage Form in Chapter 5 setting out the Insuring Agreement for Coverage A. It provides in part "We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies…." and further states in part "This insurance applies to "bodily injury" and "property damage" only if: (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; (2) The "bodily injury" or "property damage" occurs during the policy period…."

[38] **Section I - Coverage A - Exclusions.** See the Section I, Par. 2. Exclusions to the ISO Commercial General Liability Coverage Form in Chapter 5 setting out the following exclusions from coverage for the named insured's liability for bodily injury and property damage arising out of: (a) Expected or Intended Injury, (b) Contractual Liability, (c) Liquor Liability, (d) Workers' Compensation And Similar Law, (e) Employer's Liability, (f) Pollution, (g) Aircraft, Auto Or Watercraft, (h) Mobile Equipment, (i) War, (j) Damage to Property, (k) Damage To Your Product, (l) Damage to Your Work, (m) Damage to Impaired Property Or Property Not Physically Injured, (n) Recall of Products, Work Or Impaired Property, (o) Personal and Advertising Injury, (p) Electronic Data, (q) Recording and Distribution Of Material Or Information in Violation of Law.

[39] **Section I - Coverage B – Personal and Advertising Injury Liability.** See the Insuring Agreement at Par. 1 to Section I – Coverage B Personal and Advertising Injury Liability in Chapter 5. See Section V – Definitions, Par. 14 in Chapter 5 defining "**Personal and advertising injury**" as injury, including consequential bodily injury, arising out of one or more of the following offenses: (a) false arrest, detention or imprisonment; (b) malicious prosecution; (c) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (d) oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; (e) oral or written publication, in any manner, of material that violates a person's right of privacy; (f) the use of another's advertising idea in the insured's advertisement; or (g) infringing upon another's copyright, trade dress or slogan in the insured's advertisement.

[40] **Section I - Coverage C – Medical Payments.** "**Medical Payments**" is coverage for medical expenses for bodily injury caused by an accident (a) on the premises owned or rented by the insured, (b) on the ways next to the owned or rented premises, or (c) because of the insured's operations. See the Insuring Agreement at Par. 1 to Coverage C Medical Payments in Chapter 5.

[41] **Section II – Who Is An Insured.** See Section II – Who is an Insured to the ISO Commercial General Liability Coverage Form in Chapter 5.

[42] **Section III – Limits of Insurance.** See Section III – Limits of Insurance to the ISO Commercial General Liability Coverage Form in Chapter 5.

[43] **Section IV – Commercial General Liability Conditions.** See Section IV – Commercial General Liability Conditions to the ISO Commercial General Liability Coverage Form in Chapter 5.

[44] **Section IV – Definitions.** See Section V – Definitions to the ISO Commercial General Liability Coverage Form in Chapter 5.

[45] **Amendments and Endorsements.** See in Chapter 5 the forms of Amendments and Endorsements.

[46] **Contractual Liability Insurance.** See the ISO Commercial General Liability Coverage Form, Section I – Coverages, Coverage A, Par. 2 Exclusions, Par. **2.b** Contractual Liability in Chapter 5. "**Contractual Liability Insurance**" is an "exception" to an "exclusion" from coverage.

The exclusion provides:

---

2. **Exclusions.** This insurance does **not** apply to:

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This **exclusion** does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "**Insured Contract**", provided the "**Bodily Injury**" or "**Property Damage**" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. (Emphasis added by author.)

[47] **Insured Contracts.** An "**Insured Contract**" is defined in the standard CGL policy as:

9. "Insured contract" means:

a. A contract for a **lease** of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any **easement** or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you **assume the tort liability of another** party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. (Emphasis added by author.)

Also see ISO CG 21 39 Contractual Liability Limitation (form attached to this Article), which when added to the standard CGL policy by endorsement deletes "**f**" altogether from the definition of an insured contract; and discussion in Chapter 3 Insurance 201 at **II.A.11** *Exclusions May Be Invisible*.

[48] **Confession.** "I confess that I fell into the camp that it is better to be ignorant than take the responsibility of education," Bill Locke. However, he has changed this aspect of his practice due to his unwillingness to continue drafting and providing clients with documents containing provisions neither understood by the client nor himself.

[49] **ACORD Certificates.** See the ACORD certificates attached in Chapter 5.

[50] **Industry Forms.** The liability insurance forms published by the Insurance Services Office ("**ISO**") are recognized nationally as "the industry standard". However, they are not freely available to the public or the practitioner. These forms are prepared by an industry trade organization for use by its members. Copies may be purchased by contacting ISO. Neither ISO's property insurance forms nor the forms promulgated by any other industry trade organization have gained recognition as the industry standard. Also, insurers including some of the leading insurers craft their own liability and property insurance and these forms are not readily available to the public or practitioner in advance of their employment.

[51] **ISO Form Numbering System.** See Endnote **66** (ISO) to Chapter 5 Forms and Commentary for an explanation of the ISO form numbering system.

[52] **Pogo.** "We have met the enemy and he is us." Pogo by Walt Kelly (1913 - 1973).

[53] **Not Reasonable to Rely Upon an ACORD Certificate.** Macbeth, "It is a tale, told by an idiot, full of sound and fury, signifying nothing." W. Rodney Clement, Jr., *Is a Certificate of Commercial Property Insurance a Worthless Document?* PROBATE & PROPERTY 46 (May/June 2010); and Alfred S. Joseph III and Arthur E. Pape, *Certificates of Insurance: The Illusion of Protection*, PROBATE & PROPERTY 54 (Jan./Feb. 1995).

[54] **Fictitious Insured Syndrome.** An amazingly common problem in the insurance industry is the issuance by the Producer of a certificate of insurance certifying to a party to be protected that it is an additional insured on the protecting-party's insurance, but then its failure to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company refuses to provide coverage. As observed by one commentator:

> Probably the most common area in which certificates of insurance and insurance policies conflict is with respect to additional insured status. Certificate holders are often listed as additional insureds on certificates without the policy actually being endorsed to reflect that intent. An extreme case of this that often occurs is for a copy of an additional insured endorsement to be attached to the certificate but not the policy. This practice may not provide additional insured status and, thus is sometimes called the "fictitious insured syndrome." A certificate representing that there is additional insured coverage would be false, but the holder may not be aware of that fact. Because of the disclaimers saying that the certificate conveys no rights upon the holder other than what are granted in the underlying policy, courts usually conclude that the holder is out of luck in this situation …. Sometimes this problem stems from a lack of communication. The insurance agent, for example may have the authority to add another party to a policy as an additional insured and may issue a certificate indicating that this has been done while forgetting to ask the insurer to issue the endorsement. When the additional insured later seeks protection, the insurer denies such protection, shifting the blame elsewhere.

The ADDITIONAL INSURED BOOK 7th Ed., Malecki, Ligeros, and Gibson, Ch. 20 Certificates of Insurance pp. 361-362 (International Risk Management Institute, Inc. www.IRMI.com 2013).

[55] **Benefits From Obtaining A Certificate.** Even though it may not be reasonable to rely upon a certificate of insurance which contains disclaimers, there are benefits to having a certificate and potential detriments from a failure to obtain a certificate. Some courts have held that the party to be protected has waived the protecting party's obligation to procure contractually specified insurance by failing to insist upon being furnished the contractually required certificate. There are benefits arising from the standard certificate, even though it contains disclaimers, which will not obtain in the absence of a certificate. Some of the benefits are the following: (1) the standard certificate sets out important information, which in the event of a claim, may provide a quick means of resolution (*e.g.*, agent and insurer contact information, policy numbers); (2) under particular circumstances a court may be willing to disregard the certificate's disclaimers and find coverage for the party to be protected; (3) an erroneous certificate may provide a basis for recovery on the issuing agent's E & O policy or establish a contractual undertaking by the agent to provide the certificated coverage.

[56] **"Comprehensive General Liability Policy".** A "comprehensive general liability policy" was anything but comprehensive. It was a very basic liability insurance policy to which numerous endorsements had to be added. When the commercial general liability policy was introduced, it incorporated many of those changes that were previously required to be added by endorsement.

[57] **"Blanket or Broad Form Contractual Liability Coverage".** Since 1986, "blanket" or "broad form contractual liability coverage" has not existed. The current commercial general liability definition of contractual liability in the standard CGL policy achieves the same result.

[58] **"Broad Form Property Damage," "Broad Form CGL Endorsement," and "Deletion of the Personal Injury Employee Exclusion".** The same thing is true of "broad form property damage," "broad form CGL endorsement," and "deletion of the personal injury employee exclusion." Use of such terminology is indicative of lack of awareness of changes that occurred almost 27 years ago.

[59] **"Cross Liability Endorsement" or "Separation of Insureds Endorsement".** Requiring a "cross liability endorsement" is even more problematic. A cross liability endorsement in today's vernacular is an exclusion, not a provision or extension of coverage, the purpose of which is to prevent one insured from being provided coverage when sued by another insured. A "separation of insureds endorsement" or "severability of interests provision" states that each insured against whom claim is made or suit is brought will be provided a separate defense. This protection is automatically included in today's standard form commercial general liability policy.

[60] **Products-Completed Operations.** A requirement that coverage be provided for a specified number of years following substantial completion of a construction job is not a requirement that can be met by any standard insurance program, as all such programs expire annually. A requirement for the continued provision of coverage is instead a performance requirement being placed on the insured.

[61] **Notice of Nonrenewal to First Named Insured in ISO CGL Policy.** See in Chapter 5, Section IV – Common Policy Conditions, Par. 9 When We Do Not Renew providing that the CGL policy issuer is to give notice of nonrenewal only to the first Named Insured.

[62] **Notice Only to First Named Insured In ISO Property Policy .** See **Par. A** Cancellation in the ISO IL 00 17 11 98 Common Policy Conditions setting out the notices to be provided by the insurer to the first Named Insured attached in the Appendix of Forms at p. 146. See the Commentary on Forms for a discussion of the change in 2006 to the ACORD Certificate of Insurance deleting the statement that the insurer is to endeavor to give notice of policy cancellation to the certificate holder.

[63] **No Notice to Landlord.** See ISO **CP 12 18 06 07** Loss Payable Provisions p. 196 and ISO **CP 12 19 06 07** Additional Insured – Building Owner in Chapter 5.

[64] **The Risk of Failing to Confirm Insured Status.** If you want to find out how bad it can be when you do not insist on confirming the issuance of the requisite additional insured and notice of cancellation endorsements to the tenant's property policy, read *Scottsdale Ins. Co. v. Mason Park Partners, LP*, 2007 WL 2710735 (5th Cir. – Tex.) – landlord of the Taste of Katy restaurant failed to obtain endorsements on its tenant's property policy designating it as an additional insured and the insurer's agreement to give the landlord notice of policy cancellation. Although the landlord was designated as an additional insured on the liability portion of the package policy, the additional insured endorsement on the property policy stated that the name and address of the loss payee was "to follow". It never did and the insurance company did not send notice of cancellation of the property portion of the policy prior to the fire that destroyed the Taste of Katy restaurant. The court found, "Nothing in the loss payable provision or anywhere else gave Scottsdale notice that (landlord) was the intended loss payee". The landlord sustained a catastrophic uninsured loss.

[65] **Texas: Better Than Most.** The Texas Department of Insurance ("**TDI**") currently permits a "notice of cancellation or material change" endorsement. See ISO **CG 02 05 12 04** Texas Changes – Amendment of Cancellation Provisions or Coverage Change in Chapter 5. TDI has not defined what constitutes a "material change".

[66] **Contractual Liability Coverage.** See in Chapter 5 ISO Commercial General Liability Coverage Form Section I, Par. 2 Exclusions **2.b** Contractual Liability; and in Chapter 5 the Endnote (Contractual Liability Coverage – An Exception to an Exclusion From Coverage) discussing the ISO CGL policy provision granting contractual liability coverage for bodily injury and property damage to the policy's Named Insured for its contractual indemnities.

[67] **ISO and ACORD Forms.** See Endnote **66** in Chapter 5 for a discussion of ISO and the ISO insurance form numbering system. See the Commentary in Chapter 5 for a discussion of the ACORD certificate forms. Many insurance companies utilize manuscript additional insured endorsements. A manuscript endorsement is one that an insurance company makes up, which may or may not include some ISO wording. Beware of any endorsement that includes a footer reading "Includes Copyrighted Material of Insurance Services Office, Inc. With Its Permission". All manuscript endorsements require careful scrutiny. They frequently:

- Limit the parties being added as an additional insured;
- Limit the scope of coverage being provided;
- Limit the operations being covered; and
- May add new exclusions.

An example of a new exclusion is "No coverage is provided for damages because of bodily injury to employees of the insured". This obviously adversely affects the risk transfer allowed even under many of the anti-indemnification statutes recently adopted across the nation.

[68] **Limitations.** Note, some manuscripted additional insured endorsements specify a sublimit for additional insured coverage that is less than the policy limits applicable to the Named Insured. See MALECKI ON INSURANCE, *Additional Insured Coverage – A Critique of a Nonstandard Endorsement* (August, 2005, Vol. 14. No. 10, pp. 1-8) which reviews the following manuscripted endorsement to a CGL policy that specified on its Declaration Page a sublimit for additional insured coverage an amount less than the policy limits applicable to the Named Insured:

> The Limits of Insurance applicable to the additional insured are those specified in the written contract or written agreement, if any between you and the additional insured regarding the work described above, or in the Declarations of this policy, whichever is less. The coverage provided to the additional insured by this endorsement and by paragraph f. of the definition of "insured contract" under Definitions (Section V), as amended by this endorsement, does not apply to "bodily injury" or "property damage" beyond: … d. The effective date of any deletion of, any removal of, or any non-continuance of, this additional insured endorsement from this policy.

Note that this manuscripted language provides that the additional insured coverage can be terminated by the insurer's unilateral issuance of a deletion endorsement. Unless the policy is endorsed to provide the additional insured notice of the insurer's issuance of an endorsement deleting additional insured coverage, the additional insured may never learn of the termination of its coverage.

[69] **Primary Liability vs. Horizontal Exhaustion.** Neither the recommended insurance spec nor the new ISO endorsement resolves the horizontal exhaustion issue which is beyond the scope of this paper. See the Endnote (Primary and Noncontributing) in Chapter 5 for further discussion of the term "**primary and noncontributing**".

[70] **Insurable Interest.** Generally, to be eligible for insured status under a property policy, the insured must have an insurable interest in the insured property. The assumption by a tenant of liability for damage to leased premises is recognized as creating an insurable interest in the tenant. Leases for single tenant buildings sometime require the tenant to insure the improvements and to name the owner-lessor as an additional insured. Unlike the standard mortgagee coverage, other additional insurable interests endorsements do not provide coverage despite the acts of the insured, whether the first named insured (e.g., tenant) or the additional insured or loss payee (e.g., landlord). Under current ISO commercial property forms, intentional concealment or misrepresentation of a material fact by any insured voids coverage for the additional insured. In November 2008 ISO issued its form CP 12 19 Additional Insured – Building Owner endorsement to designate a building owner as a "Named Insured" for damage to the building on a tenant's property policy covering the building. It is the "insureds" who receive the loss payment under a property policy. Thus, it is unnecessary to specify that the building owner also be designated as a loss payee when it is designated as an insured.

---

[71] **Mortgageholder Rights.** See ISO Building and Personal Property Coverage Form Par. F.2 Mortgageholders setting out the rights of a mortgageholder which is scheduled on the Declarations Page of the ISO property policy in Chapter 5.

[72] **ISO CP 12 18 Loss Payable Provisions.** See ISO CP 12 18 Loss Payable Provisions form in Chapter 5.

[73] **Basic Causes of Loss.** A "basic causes of loss" policy is extremely basic in the scope of coverage provided.

[74] **Broad Causes of Loss.** A "broad causes of loss" policy is broader than a basic form, but is not very broad.

[75] **Special Causes of Loss.** The most comprehensive ISO property policy is called "Special Form" or "Special Causes of Loss Form." A "special causes of loss" policy is what most lawyers, laymen and many insurance professionals think of as an "all risk" form and is by far the most common form of property insurance in use. This form is in contrast to "Named Perils Coverage" which applies only to loss arising out of causes that are listed as covered. See Endnote (*Property Insurance – "Causes of Loss"*) in Chapter 5.

[76] **Declarations Page with Schedule of Forms.** See the ISO Commercial Property Coverage Part Declarations Page with Schedule of Forms in Chapter 5.

[77] **Common Policy Conditions.** See the ISO Common Policy Conditions in Chapter 5. Condition A of this form provides for the policy to be cancelled by the "first Named Insured" and by the insurer upon notice to the "first Named Insured".

[78] **Building and Personal Property Coverage Form.** See the ISO Building and Personal Property Coverage Form in Chapter 5.

[79] **Coverages.** Section A provides for (1) Covered Property; (2) Property Not Covered; (3) Covered Causes of Loss; (4) Additional Coverages as to (a) Debris Removal, (b) Preservation of Property, (c) Fire Department Service Charge, (de) Pollutant Clean-up And Removal, (e) Increased Cost of Construction, and (f) Electronic Data; (5) Coverage Extensions as to (a) Newly Acquired Or Constructed Property, (b) Personal Effects and Property Of Others; (c) Valuable Papers and Records (Other Than Electronic Data), (d) Property Off-premises, (e) Outdoor Property, (f) Non-owned Detached Trailers, (g) Business Personal Property Temporarily in Portable Storage Units.

[80] **Loss Conditions.** The property policy at Section E sets out certain conditions to payment including (6) Vacancy.

[81] **Additional Conditions.** The property policy provides in Section F for certain additional conditions applicable to payment including (1) Coinsurance and (2) Mortgageholders.

[82] **Optional Coverages.** The property policy addresses at Section G selected valuation methods if selected on the Declarations Page: (1) Agreed Value; (2) Inflation Guard; and (3) Replacement Cost; and (4) Extension of Replacement Cost To Personal Property Of Others.

[83] **Business Income Insurance.** See the ISO Business Income (And Extra Expense) Coverage Form in Chapter 5.

[84] **Leasehold Interest Coverage Form.** See the ISO Leasehold Interest Coverage Form in Chapter 5.

[85] **Leasehold Interest Coverage Form - Coverages.** This endorsement is to insure the Tenant for its "**Covered Leasehold Interest**" lost due to the cancellation of its lease resulting from physical loss of or damage to property at the premises caused by a Covered Cause of Loss in the amount of the "**net leasehold interest**" shown in the Leasehold Interest Coverage Schedule for the following as designated on the Declarations Page: (a) Tenants' Lease Interest; (b) Bonus Payments; (c) Improvements and Betterments; and (d) Prepaid Rent.

[86] **Commercial Property Conditions.** See the ISO Commercial Property Conditions in Chapter 5 addressing among other matters authorizing pre-loss waiver by landlord or tenant, and authorizing post-loss waiver by landlord of tenant.

[87] **Endorsements.** See the following Endorsements to the ISO Commercial Property in Chapter 5 as follows: Ordinance or Law Coverage; Debris Removal Additional Insurance; Loss Payable Provisions; Scheduled Building Property Tenant's Property; Unscheduled Building Property Tenant's Policy; Additional Insured – Building Owner.

[88] **Replacement Cost.** See in Chapter 5 Building and Personal Property Coverage Form, **Par. G.3** Optional Coverages – Replacement Cost and Declarations Page.

[89] **ACV.** See in Chapter 5 Building and Personal Property Coverage Form, **Par. G.1** Agreed Value – Replacement Cost and Declarations Page.

[90] **Inflation Guard.** See in Chapter 5 Building and Personal Property Coverage Form, **Par. G.2** Optional Coverages – Inflation Guard Cost and Declarations Page.

[91] **Specific Specifications Are Better than General Narrative Specifications.** See in Chapter 3 Insurance 201 .